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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DANE WARD,

Defendant and Appellant.

2d Crim. No. B287932  
(Super. Ct. No. BA446469)  
(Los Angeles County)

Michael Dane Ward appeals from judgment after conviction by jury of multiple sexual offenses against his two stepchildren: two counts of committing lewd acts against E.M. (Pen. Code, § 288, subd. (a))<sup>1</sup>; two counts of committing lewd acts against C.M. (§ 288, subd. (a)); two counts of committing forcible lewd acts against E.M. (§ 288, subd. (b)(1)); three counts of orally copulating E.M. (§ 288.7, subd. (b)); and one count of sodomizing E.M. (§ 288.7, subd. (a)). The jury found not true allegations that

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

Ward committed the lewd acts against multiple victims. (§ 667.61, subds. (b) and (e).) The trial court sentenced Ward to 28 years in state prison plus 70 years to life.

Ward contends the court erred when it admitted the children's videotaped forensic interviews and expert testimony about Child Sexual Abuse Accommodation Syndrome (CSAAS), that the evidence is insufficient to support his convictions, and that his trial counsel rendered ineffective assistance. We affirm.

### BACKGROUND

Jessica M. (Mother) has two children, E.M. and C.M. She married Ward when E.M. was seven years old and C.M. was six. Ward has two children of his own.

When C.M. was 10 years old and E.M. was 11, C.M. told Mother that she did not want to be left alone with Ward. C.M. said Ward made her play "naked wrestling." E.M. told Mother that Ward had exposed his penis to him after he showered. Mother took the children to her parents' home and reported Ward to the Department of Child and Family Services (DCFS).

A social worker from DCFS interviewed the children in their grandparents' home. Sheriff's deputies came to the house and a deputy interviewed each child. E.M. disclosed additional acts of abuse, but not all of the acts that he later disclosed in a forensic interview and at trial.

Two weeks later, a forensic nurse interviewed the children on videotape at a child advocacy center. The trial court admitted the videotaped interviews for the truth of the matters asserted therein pursuant to Evidence Code section 1360. It first conducted a hearing on Ward's objection to their admission pursuant to Evidence Code section 402.

At the 402 hearing, Mother testified about the children's disclosures to her. The investigating deputy and forensic nurse testified about their interviews of the children. The trial court found both forensic interviews contained sufficient indicia of reliability to be admitted. It invited defense counsel to object to specific portions of the videotapes. He did not do so, and the tapes were played at trial without redaction.

E.M. testified at trial that Ward abused him multiple times. Ward forced E.M. to orally copulate him in a bedroom after strapping E.M.'s wrist to a dresser with his watch and pinning E.M. down with his knee. C.M. was sleeping in the room. On another occasion, Ward sodomized E.M. outside a shower after pushing him to the ground. E.M. said he was in fourth grade at the time.

Ward forced E.M. to orally copulate him another time after he pulled E.M. to the ground, put his knees on E.M.'s stomach, and forced E.M.'s mouth open with his hands. Ward threatened to kill or hurt E.M. if he told anyone. E.M. also testified that Ward grabbed E.M.'s testicles when they wrestled.

In the videotaped interview, E.M. described a third act of oral copulation in a bedroom. He also said that Ward hugged him for a long time and squeezed his bottom once when he got out of the shower. Another time when E.M. got out of the shower, Ward grabbed him by the penis. Ward forced E.M. to touch his penis two or three times. Also in the videotaped interview, E.M. said Ward grabbed his testicles multiple times when they wrestled.

C.M. testified that Ward asked her to play naked wrestling when no one else was home. Whenever he pinned her down, she had to remove a clothing item. She removed both shoes and socks, but she left the room when he said she had to remove her

shirt. In her videotaped interview, she said Ward told her she would get in trouble if she told anyone. C.M. also testified at trial that once when she was showering, Ward came into the bathroom naked and opened the shower door. She quickly left the shower and wrapped herself with a towel. She did not describe the shower incident at the preliminary hearing.

In the videotaped interview, C.M. said Ward complained when she kissed him with a closed mouth that it was not a real kiss. Five or six times he kissed her with an open mouth. She could feel his tongue on her teeth. She also described an incident when he came into her room and hugged her when she was not wearing a shirt.

A child sexual abuse accommodation expert, Susan Hardie, testified about Child Sexual Abuse Accommodation Syndrome (CSAAS), which may involve secrecy, helplessness, accommodation, delayed or conflicting disclosures, and recantation. She did not offer any statistics or opine about the facts of this case. She had not reviewed any information concerning Ward and the children. She said CSAAS is not a diagnostic tool and cannot be used to determine if sexual abuse has occurred.

The defense called one witness, the social worker who first interviewed E.M. and C.M. She said E.M. did not tell her about any oral copulation or sodomy. She did not independently recall the interview, but had her written report which said Ward grabbed E.M.'s penis during a wrestling match. She said the interview lasted about 30 minutes, she had about 10 minutes to try to make E.M. feel comfortable, and in her experience that was not enough time for him to disclose everything that had happened to him.

The trial court denied a motion for new trial that was based on ineffective assistance of counsel.

## DISCUSSION

### *Videotaped Forensic Interviews*

Ward contends the trial court abused its discretion when it admitted the videotaped interviews because they were unreliable and untrustworthy. He also contends trial counsel rendered ineffective assistance when he did not ask to redact the videotapes.

Evidence Code section 1360 provides a hearsay exception for statements by children under the age of 12 describing sexual abuse if the child testifies at the proceeding and the “time, content, and circumstances of the statement provide sufficient indicia of reliability.” Reliability is a matter for the trial court’s wide discretion. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1329-1330.)

The trial court did not abuse its discretion when it found there were sufficient indicia of reliability to admit the interviews. The forensic nurse testified that she followed medical protocol in the interviews. She stressed the importance of telling the truth, asked open-ended questions, and spoke as little as possible. Factors that are relevant to determine reliability of a child witness in a sexual abuse case include spontaneity and consistent repetition, the child’s mental state, unexpected terminology for a child of that age, lack of a motive to fabricate, as well as the child’s ability to differentiate between truth and falsehood. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29-30; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445.) The children demonstrated that they understood the importance of telling the truth.

C.M. was 10 years old. As the trial court noted, many of her statements were consistent with her preliminary hearing testimony and her statements to Mother and the deputy.

E.M. was 11 years old. He appeared to be embarrassed when he described the incidents. He did not overstate and he corrected inaccuracies. Details about a liquid coming out of Ward's penis and rectal pain and bleeding after sodomy would not ordinarily be known to a child of his age. Many of his statements were consistent with prior statements.

Ward contends counsel should have sought to redact the children's statements that Ward did "things" to his biological children, was unfaithful to Mother, kept guns in the house, physically abused them, and threatened to kill himself. He has not demonstrated deficient performance or prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Defense counsel decided not to seek redaction. He said on the record that he was inclined to have the full interviews played and he would let the court know if he changed his mind. Ward offers no declaration explaining counsel's reasons. Where, as here, the record sheds no light on why counsel acted or failed to act in the manner challenged, and he was not asked for an explanation, the claim on appeal must be rejected unless there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Counsel could have concluded that redaction would emphasize the charged conduct, that playing the full tapes might lessen their impact, and that the children's anger and complaints about Ward could show a motive to fabricate claims against him. The trial court expressly acknowledged that counsel might prefer to play the full tapes.

Moreover, there is no reasonable probability the result would have been different if counsel requested redaction because the request would likely have been futile. (*People v. Price* (1991) 1 Cal.4th 324, 387 [failure to make objections that counsel reasonably determines would be futile is not ineffective assistance], superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161.) The trial court invited Ward to make a record of any objections to particular statements, but the statements he now identifies as prejudicial were admissible to establish the basis of the children's fear of Ward. Their fear was highly relevant to explain their delayed disclosure and to rebut the defense theory that they were making up their claims because they simply disliked him.

#### *Sufficiency of Evidence*

Ward contends the trial testimony only establishes one out of four charged acts of lewd conduct against E.M., two out of three charged acts of sodomy, and does not establish that E.M. was 10 years of age or younger for purposes of the oral copulation and sodomy charges. We disagree.

The forensic interviews provided substantial evidence. (Evid. Code, § 1360.) Ward points to E.M.'s trial statements that some of the abuse could have been a dream, but those statements were contradicted by his many other specific descriptions of Ward's abuse. Inconsistencies between the trial testimony and earlier interviews created issues of weight and credibility for the jury. We will not reweigh the evidence or reevaluate credibility. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Ward was convicted of four acts of lewd conduct toward E.M., two with force or fear and two without. The charges

required proof that Ward touched a child under 14 years of age with sexual intent. (§ 288, subd. (a).)

The two counts of simple lewd conduct toward E.M. were supported by E.M.'s trial testimony that Ward grabbed his testicles when they were wrestling and by E.M.'s videotaped statement that Ward hugged him for a long time while E.M. was wearing only a towel. The jury could reasonably infer Ward's sexual intent from evidence of Ward's other conduct toward the children and consciousness of guilt, including overtly sexual acts, secrecy, nudity, and threats. (*People v. Martinez* (1995) 11 Cal.4th 434, 445 [the trier of fact looks at all the circumstances to determine intent, including the charged act, defendant's extrajudicial statements, other lewd acts, the relationship of the parties, and efforts to avoid detection].)

The two counts of forcible lewd conduct toward E.M. were supported by E.M.'s videotaped statement that Ward forced him to touch Ward's penis "a couple of different times," "like three times maybe." E.M. said one time Ward grabbed E.M.'s hand and made him touch Ward's penis. Another time, Ward held E.M.'s arms tight and rubbed his penis against E.M.'s.

The convictions for three counts of oral copulation in violation of section 288.7, subdivision (b) required proof that E.M. was 10 years of age or younger at the time. They were supported by E.M.'s videotaped statements about three acts of oral copulation and his trial testimony about two of those acts. At trial, E.M. said that the conduct happened months or weeks before he talked to police, a time at which time he would have been 11 years old. But E.M. told the forensic nurse that the oral copulation occurred when he was "in fourth grade or younger."



He did not turn 11 until fifth grade. We resolve such evidentiary conflicts in support of the judgment.

The conviction for one count of sodomizing E.M. also required proof that E.M. was 10 years of age or younger. (§ 288.7, subd. (a).) At trial, E.M. described Ward's act of sodomy but testified he could not remember what grade he was in or how old he was. But the conviction was supported by E.M.'s videotaped statement that it occurred in "[l]ike fourth grade."

The two convictions for committing lewd acts toward C.M. were supported by her testimony about naked wrestling and her videotaped statements about Ward's open-mouthed kiss. "Because intent for purposes of Penal Code section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances." (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 440.) The jury could reasonably infer Ward's intent to sexually exploit C.M. from the circumstances of the wrestling, his requirement that C.M. remove her clothes, his insistence on secrecy, and his complaints that her kisses were not "real" because her mouth was closed.

#### *CSAAS Testimony*

Ward contends the trial court should not have allowed expert testimony about CSAAS. He argues the testimony was impermissibly broad in scope, implied numerical statistics about truthfulness, and that if the claim is forfeited his trial counsel rendered ineffective assistance. We disagree.

The trial court properly admitted the CSAAS evidence for the limited purpose of disabusing the jury of any misconceptions about the way children generally react to sexual abuse. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.) As the expert acknowledged in her testimony, CSAAS evidence is not

admissible to prove that a particular child was abused. (*People v. Wells* (2004) 118 Cal.App.4th 179, 188.)

CSAAS evidence may deprive a defendant of a fair trial if it is used to suggest he is guilty based on statistical probabilities. (*People v. Julian* (2019) 34 Cal.App.5th 878, 886.) But the expert did not offer any statistics. We reject Ward's contention that the expert implied a statistical probability that the children's claims were true when she described only one case in response to defense counsel's question whether she had ever known of children lying about sexual abuse. She told about one case in which a child truthfully recanted, and then said, "otherwise, I don't have a whole lot to go on as far as if a child is lying." This was not an assertion that false claims are rare. The expert plainly stated she had nothing "to go on" about that, one way or the other. And she offered no testimony about the numbers of false versus true claims.

We reject Ward's contention that the expert should not have been permitted to testify that she worked with veterans who had been abused as children or that she gained knowledge through conversations with law enforcement officers, friends, students, and others. These were appropriate background facts. (Evid. Code, § 720, subd. (a) [an expert is permitted to rely on background and experience].)

We also reject Ward's contention that his trial counsel provided ineffective assistance in responding to the CSAAS testimony. Trial counsel objected to the expert's testimony on the ground that it was not scientifically reliable and obtained a ruling limiting the scope. The defense did not call a rebuttal expert, but Ward does not demonstrate that such an expert could have offered any competing view of CSAAS that would have

resulted in a more favorable outcome at trial. Counsel could reasonably have determined that further testimony about CSAAS would emphasize the syndrome and further undermine the defense theory that the children were fabricating.

*Motion for New Trial – Ineffective Assistance of Trial Counsel*

After the jury returned its verdicts, Ward moved for a new trial based on ineffective assistance of counsel. Ward's motion argued that trial counsel did not lay a proper foundation to impeach E.M. and C.M. with prior statements, did not object to portions of the forensic interviews, should have investigated and presented evidence that E.M. had falsely accused a boy of sitting on his face with bare testicles, and should have presented experts on CSAAS and E.M.'s mental state. The motion relied heavily on investigative reports and declarations that were not part of the trial record. Ward did not offer a declaration from trial counsel. The court denied the motion and commented that there were tactical reasons not to call a CSAAS expert and that "all counsel did an excellent job."

Ward contends the court abused its discretion in denying the motion because it ignored counsel's blunders, did not "independently address" the prejudicial nature of C.M.'s interview statements about Ward's conduct with his own children, did not address the new evidence, and did not explain what tactical reasons there were to rebut the CSAAS expert's testimony with a defense expert. We are not persuaded.

Ineffective assistance of counsel is not a statutory ground for a motion for new trial. (§ 1181.) A trial court may entertain a motion for new trial based on ineffective assistance when its own observations of the trial will allow it to expeditiously resolve the issue. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved

on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Where, as here, the motion is based largely on matters outside the trial record, it should be resolved in a habeas corpus proceeding instead. (*Cornwell*, at p. 102.)

To the extent Ward's claims are based on the trial record, he does not demonstrate deficient performance or prejudice. "[W]hether certain witnesses should have been more rigorously cross-examined [is] normally left to counsel's discretion and rarely implicate[s] inadequate representation." (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) Our review of the record supports the trial court's observation that counsel's cross-examination was competent. Tactical reasons exist for not calling another CSAAS expert, and for not seeking to redact the videotapes, as discussed above.

#### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Lisa B. Lench, Judge

Superior Court County of Los Angeles

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